BANK BUMIPUTRA (M) BHD.

v.

WILLIAM NAIS & ORS.

HIGH COURT BORNEO
RICHARD MALANJUM JC
[SUIT NO. KG 196 OF 1990]
14 MAY 1992

CIVIL PROCEDURE: *Appeal to Judge-in-chambers - Decision by Registrar allowing writ/ statement of claim to be struck out - Failure by plaintiff to specifically plead default by borrower - Defendant/guarantors' contention was that no reasonable cause of action disclosed against them - Whether consideration of evidence permissible for applications made under O. 18 r. 19(1)(a) - Order 56 r. 1 RHC 1980 - Order 18 r. 19 RHC 1980 - Section 81 Contracts Act 1950.*

The defendant guarantors sought to strike out the plaintiff's statement of claim on the ground that no reasonable cause of action had been disclosed against them by reason of the fact that the plaintiff had omitted to plead default on the part of the borrower. The Registrar found in favour of the defendants and struck out the plaintiffs claim pursuant to O. 18 r. 19 RHC 1980. The plaintiff appealed.

Held:

[1] The statement of claim has sufficiently established a cause of action against the respondents (defendants) by referring to (i) the existence of a letter of guarantee as the foundation of the action (ii) that there is an outstanding sum payable by the respondents (defendants) in connection with the aforesaid letter of guarantee and (iii) that there was a demand made on the respondent and the respondent had not complied with the demand.

[2] The contention of the respondents that the issue of default on the part of the borrower was a necessary matter for the appellant to plead in the statement of claim before it could be said a cause of action had arisen against them involves a question of construction of the letter of guarantee. The provisions of the letter of guarantee are the over-riding consideration as to whether any clause provides therein that there must be default by the borrower before the guarantor can be held liable. However such an exercise of construction of the said letter is not possible as it is settled law that no evidence shall be admissible in an application based on O. 18 r. 19(1)(a), and, the Court is entitled to only consider the pleadings for the purpose of determining whether any reasonable cause of action exists.

[Appeal allowed. Order of the learned Registrar set aside. 4 weeks to defendant to file statement of defence.]

Cases referred to:

Lee Nyen Choi v. Voon Noon [1979] 2 MLJ 28 ***(cit)***
Drummond-Jackson v. BMA [1970] 1 All ER 1094 ***(cit)***
New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226 ***(foll)***
Syarikat Jaya v. Star Publication (M) Bhd. [[1990] 3 CLJ (Rep) 151 ***(cons)***
Goverment of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(cons)***
Bradford Old Bank v. Sutcliffe [1918] 2 KB 833 ***(cons)***
Golden Century Development Sdn. Bhd. v. Gan Hoe [1982] CLJ (Rep) 106 ***(cit)***
Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani [1985] CLJ (Rep) 41 ***(foll)***
Rickaby v. Lewis [1905-1906] 22 TLR 130 ***(cit)***

Lloyds v. Harper ***[1880] 16 Ch D 290***
Eshelby v. Federated European Bank Ltd. [1932] 1 KB 423 ***(cit)***
Mok Hin Wah & Ors. v. United Malayan Banking Corpn. Bhd. [1987] 2 MLJ 610 ***(cit)***
UMW (Sarawak) Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors. [1989] 3 MLJ 177 ***(cit)***
Rumah Nanas Rubber Estates Sdn. Bhd. v. N.M Rothschild & Sons (Singapore) Ltd. & Ors. [1990] 1 MLJ 257 ***(cit)***

Legislation referred to:
Contracts Act 1950, s. 81
Rules of the High Court 1980, O. 18 r. 19(1)(a), O. 56 r. 1

For the appellant/plaintiff - Libat Langub; M/s. Dr. Yaacob & Ismail
For the 1st & 2nd respondents/defendants - Ivan Ong; M/s. Lim Tan & Partners

JUDGMENT

Richard Malanjum JC:

This is an appeal by the appellant/plaintiff by way of notice of appeal to Judge in chambers pursuant to O. 56 r. 1 of the Rules of the High Court 1980 (hereinafter referred to as "the said Rules") against the decision of the learned Registrar given on 29 January 1992 allowing the application of the respondents/defendants (that is, 1st and 2nd defendants) under O. 18 r. 19 of the said Rules to strike out the writ of summons and the statement of claim of the appellant/plaintiff dated 14 November 1990.

The grounds of the respondents/defendants in making the application were in the alternatives, namely (i) that the statement of claim of the plaintiff discloses no reasonable cause of action; or (ii) it is scandalous, frivolous or vexatious; or (iii) it may prejudice, embarrass or delay the fair trial of the action; or (iv) it is otherwise an abuse of the process of the Court. Affidavit affirmed by William Nais (the 1st defendant) on 23 October 1991 (William Nais' affidavit) and a supplementary affidavit of Ivan Ong affirmed on 14 November 1991 (Ong's affidavit) were filed in support of the application. The appellant/plaintiff meanwhile opposed the application by filing an affidavit in opposition affirmed by Ramli bin Haji Taib on 3 January 1992 and filed herein (Ramli's affidavit).

Before me, learned Counsel for the appellant/plaintiff submitted that the respondents/defendants in fact relied only on the ground that the statement of claim of the appellant/plaintiff discloses no reasonable cause of action by reason of failure to plead default on the part of the borrower. He then proceeded to elaborate and argued that para. 7 of the statement of claim has shown default by the borrower since the outstanding amount has been specifically stated. Learned Counsel also submitted that default by the borrower need not be pleaded as the letter of guarantee upon which the action of the appellant/plaintiff was based provided no such requirement. The respondents/defendants were sued as principal debtors. Section 81 of the Contracts Act 1950 was also briefly referred to in submission.

Learned Counsel for the respondents/defendants before me repeated his submissions made before the learned Registrar in that there was a failure to specifically plead default by the borrower and as such no cause of action has arisen against the respondents/defendants. This issue as submitted and failure to show any subsequent demand based on the borrower's default were the reasons for the learned Registrar's decision in allowing the application.

After having perused the statement of claim and the authorities cited and having heard the submissions from both sides I allow the appeal and I grant leave to the respondents/defendants 4 weeks from 14 May 1992 to file their defence upon application by their learned Counsel.

The application of the respondents/defendants was for striking out under O. 18 r. 19 of the said Rules of the writ of summons and the statement of claim of the appellant/plaintiff issued against them. There are numerous decided authorities both local and foreign expounding the governing principle to be considered by the Court before allowing such an application. Such application should only be allowed in plain and obvious case [See: *Lee Nyen Choi v. Voon Noon* [1979] 2 MLJ 28; *Drummond-Jackson v. BMA* [1970] 1 All ER 1094]. Meanwhile, in the instant case although the respondents/defendants cited the four grounds as provided under O. 18 r. 19 of the said Rules only ground one that is, O. 18 r. l9(1)(a) of the said Rules was relied upon and as admitted by learned Counsel for the respondents/defendants. No submission was therefore made on the other grounds. On that basis alone therefore that I consider this appeal.

It is a settled law that where the applicant relies on O. 18 r. l9(1)(a) of the said Rules no evidence shall be admissible and the Court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence.

> The test to be applied is whether on the face of the pleading, the Court is prepared to say that the cause of action or the defence is obviously unsustainable.

per Mohd. Azmi FJ (now SCJ) in *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226 at p. 227 I (right).

However, before considering the test as given in that case, perhaps it may be appropriate to have a brief look into the approaches of the Court on the terms "cause of action" and "reasonable cause of action".

> "A cause of action" has been defined as:
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> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. [See: per Lord Esher MR at p. 131 in *Read v. Brown* [1888] 22 QBD 128]. This has been elaborated in *Coburn v. Colledge* [1897] 1 QB 702 by Lord Esher MR at p. 707 to mean:
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> > the plaintiff in order to make out a cause of action must assert certain facts which, if traversed, he would be put to prove ... The words "if traversed" were inserted to make it clear that the facts spoken of were those which the plaintiff must allege in his statement of claim ...

In *Syarikat Jaya v. Star Publication (M) Bhd.* [1990] 3 CLJ (Rep) 151 at p. 153, His Lordship Datuk Edgar Joseph Jr. J (as he then was) has taken the definition of 'a cause of action' to mean "all the facts and circumstances necessary to give rise to a right for relief in law or equity".

In the *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, Salleh Abas LP at p. 19 G (left) defined "a cause of action" as:

> a statement of fact alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action.

And Pickford LJ in *Bradford Old Bank v. Sutcliffe* [1918] 2 KB 833 at p. 840 stated that:

> ... A cause of action accrues when all the facts exist which it is necessary to prove as a part of the case.

As for "a reasonable cause of action" it has been defined as "a cause of action with some chance of success, when only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out", per Lord Pearson at p. 1101 in *Drummond-Jackson v. BMA* (*Supra*).

Coming back therefore to the present case I find from the statement of claim that the requirement to establish a cause of action as described in the cases cited above has been shown and which cause of action is not obviously unsustainable. The statement of claim has shown the following matters namely: the existence of the letter of guarantee dated 13 February 1979 as the foundation of the action, that there is an outstanding sum payable by the respondents/defendants in connection with the said letter of guarantee, that there was demand made on the respondents/defendants and that the respondents/defendants have not complied with the demand. The respondents/defendants contended that the issue of default on the part of the borrower was another necessary matter for the appellant/plaintiff to specifically plead in the statement of claim before it could be said that a cause of action against them has arisen under the said letter of guarantee. As to whether or not this is so in my view is a question of construction of the said letter of guarantee. At this stage however by reason of this application being made under O. 18 r. l9(1)(a) of the said Rules such exercise cannot be considered as no evidence is admissible. [See: *Golden Century Dvpt. Sdn. Bhd. v. Gan Hoe* [1982] CLJ (Rep) 106; *New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd.* (*Supra*)].

Indeed in an action based on a letter of guarantee the construction of the document is a crucial factor to determine the rights and obligations of the parties thereto and when such rights and obligations have arisen. In *Lloyds v. Harper* [1880] 16 Ch. D 290 Fry J stated thus at p. 303:

> A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances.

This passage was referred to by Lee Hun Hoe CJ (Borneo) in *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1985] CLJ (Rep) 41.

Learned Counsel for the respondents/defendants also submitted that it is a matter of law that there must be default by the borrower before the liability of the surety/guarantor arises. Much reliance were placed on the cases of *Rickaby v. Lewis* [1905-06] 22 TLR 130 and *Eshelby v. Federated European Bank Ltd.* [1932] 1 KB 423. I have read both the cases and both also relied on the terms of the documents to determine whether or not liabilities of the sureties had arisen. I found both cases not the authorities to the proposition of the law as submitted by learned Counsel for the respondents/defendants.

In my view therefore the provisions of the letter of guarantee are the over-riding consideration, that is, whether there is any clause to make it a condition-precedent that there must be default by the borrower before the guarantor (surety) can be held liable [See: *Mok Hin Wah & Ors. v. United Malayan Banking Corpn. Bhd.* [1987] 2 MLJ 610]. Owing to the ground relied in this case I am precluded from considering whether such is the case here. Anyway, it may be noteworthy that in *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani (Supra)* Lee Hun Hoe CJ (Borneo) stated at p. 43 that:

> ... The guarantor has no special right to demand that the creditor call upon the principal debtor to pay off the debt before asking the guarantor to pay.

There is therefore no merit in the submission of the learned Counsel for the respondents/defendants on this point.

For the foregoing reasons I therefore allow the appeal of the appellant/plaintiff and set aside the order of the learned Registrar.

As for the cases which were cited by the learned Counsel for the respondents/defendants, namely (i) *UMW (Sarawak) Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1989] 3 MLJ 177; (ii) *Rumah Nanas Rubber Estates Sdn. Bhd. v. N.M. Rothschild & Sons (Singapore) Ltd. & Ors.* [1990] 1 MLJ 257 and (iii) *Interfinance Bhd. v. King Shih Fan (Suit No. KG 238 of 1987)*. I do not think the principles stated therein are applicable to the instant case.

In the case of *UMW (Sarawak) Sdn. Bhd.,* it was a claim of a right created by statute and it is a statutory requirement that notice must be given; whereas in the instant case there is no such statutory requirement and nothing was shown by learned Counsel for the respondents/ defendants. At most therefore it depends on the provisions of the said letter of guarantee of which by nature of this application such evidence is not admissible at this stage.

As for the case of *Rumah Nanas* it was again based on the term of the guarantee document to determine if default by the borrower was a condition-precedent to give rise to a cause of action.

In respect of the *Interfinance Bhd.,* case, the facts as found by the learned Judge as necessary to be pleaded such as the memorandum of charge and the terms therein were derived from evidence adduced by way of affidavits and exhibits filed. Whereas in the instant case I need only to look at the pleading (in this case only the statement of claim) to decide whether or not the claim is obviously unsustainable. Anyway, I do not think that the learned Judge in *Interfinance Bhd.,* case laid down a general rule that in an action based on guarantee document the liability of the guarantor would only arise upon default by the borrower. Each case has to be considered in the light of the terms of the relevant guarantee document and the surrounding circumstances.

In respect of the other issues raised by the learned Counsel for the appellant/plaintiff I do not think it is necessary to consider in view of the conclusion I have arrived at.

I also award costs to be taxed to the respondents/defendants for the hearing of this appeal only in the exercise of my discretion. I feel that the learned Counsel for the appellant/plaintiff should have made in-depth study of the issues involved before the application was heard by the learned Registrar. If he has done that the learned Registrar would have been in a better position to consider all the issues involved before coming to her decision. Even before me the issues involved were only addressed in a very superficial manner and left much to be desired.

Also found in [1992] 3 CLJ 1569